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In the Supreme Court of the United States

October Term, 1942.

HERBERT FREDERIC MILLER, *Petitioner,*

vs.

ELSIE A. MILLER, *Respondent.*

Response to Petition for Writ of Certiorari.

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RESPONSE TO PETITION FOR WRIT OF *CERTIORARI*.

Preliminary.

By way of discussion preliminary to the argument in answer to the points submitted by petitioner, we observe that although petitioner proceeds upon the theory that the court below overlooked the doctrine and policy in *Erie R. Co. v. Tompkins*, 304 U. S. 64, and subsequent cases in accord therewith, and that the court below decided the case in conflict with controlling decisions of the highest court of Oklahoma, petitioner has failed to call attention to any Oklahoma case presenting issues the same or similar to those involved in this case in which the holding is at variance with the holding rendered in this case. As more fully appears hereafter, petitioner has cited cases in support of his position in which it appears that one or more of the following elements was present: (1) Alimony relief had actually been granted in a previous proceeding. (2) The alimony agreement had been explicitly held by the trial court to be "unfair." (3) That the alimony agreement appeared from a

construction thereof to have been *intended* by the parties to be superseded or extinguished by the divorce decree.

In the instant case, none of the foregoing elements are present. Alimony relief involving the contract herein had never been granted in a previous proceeding. The contract involved herein was not adjudicated to be unfair by the state trial court. Also as was held by the Circuit Court of Appeals the contract herein appears upon a construction and intepretation giving full effect and purpose to the intention of the parties to have been intended to be unimpaired by the decree entered in either the divorce or alimony proceeding. Petitioner, therefore, has failed to present to this court any Oklahoma decision which would be *controlling in this case* and which is in conflict with the opinion of the Circuit Court of Appeals. The precise questions discussed in the cases cited by petitioner not being the same or analogous to those involved in this case, the federal courts are, of course, not required under the rule announced in *Erie R. Co. v. Tompkins* to apply such cases to a different state of facts. (See *Powell v. Maryland Trust Company*, 125 F. (2d) 260, *certiorari* denied 316 U. S. 671, petition for rehearing denied 316 U. S. 711.)

As a matter of fact, respondent states that the controlling Oklahoma decisions in this case which are hereinafter cited and discussed by respondent are fully and completely in accord with the opinion rendered by the Circuit Court of Appeals.

Furthermore, the decision of the lower court involves primarily a factual determination and this court does not grant *certiorari* to review questions or conclusions of fact.

We will take up the five points argued in petitioner's brief in their numerical order.

Petitioner's Point One.

Petitioner states:

“This cause is governed by controlling decisions of the Supreme Court of Oklahoma.”

We take no issue with this statement as a proposition of law. In our opinion, however, it is questionable whether this rule is applicable in this case and in any event we believe that the controlling Oklahoma decisions support the opinion of the Circuit Court of Appeals.

Petitioner's Point Two.

Petitioner states:

“By reason of the decision in *Miller v. Miller*, the instant action cannot be maintained.”

The judge in the state trial court tried the case as an action to recover *alimony* rather than an action to recover on *contract*. The question as to whether the petitioner has discharged his *contractual* obligations was never adjudicated in the state court. On appeal to the Supreme Court of the State of Oklahoma (*Miller v. Miller*, 99 P. (2d) 515) the Supreme Court explicitly refused to treat the action as one *ex contractu* stating as follows, in the opinion:

“This case is thus definitely identified as an action for alimony as distinguished from an action *ex contractu*.”

The Supreme Court then proceeded to affirm the holding of the trial court in so far as petitioner's statutory obligation to pay alimony was concerned. The state trial court and the state Supreme Court at no time proposed to pass upon the legal effect and purpose of the contract but on the contrary carefully refrained from passing on said ques-

tion. Therefore, the denial of alimony in the action treated as a strictly alimony action cannot be said to be tantamount to a disapproval of the contract.

The case of *Dresser v. Dresser*, 164 Okl. 34, 22 P. (2d) 1012, cited by petitioner is not in point because the court's denial of alimony in that case was based upon the specific reason that "the agreement was manifestly unfair." The court further stated in that case "while the parties may contract with regard to alimony, unless the agreement is fair to both parties, it will not be permitted to stand." Petitioner cannot point to a single word in the Oklahoma record of this case holding the contract here involved to be "unfair." The Oklahoma courts never disapproved the instant contract (as was done in the *Dresser* case) thus affording both parties the fair and equal opportunity to adjudicate the questions in an action *ex contractu* before a proper forum.

Furthermore, the *Dresser* case was decided several years prior to the cases of *Stark v. Stark* and *Murphy v. McElroy*, hereafter cited, which cases for the first time in Oklahoma courts definitely settled the right to maintain an action *ex contractu* on alimony contracts, such as is involved here.

Petitioner's Point Three.

Petitioner states:

"The Circuit Court of Appeals was bound by controlling decisions of the Supreme Court of Oklahoma under which the contract sued on was extinguished by the state court judgment in *Miller v. Miller*."

The controlling decisions of the Supreme Court of Oklahoma support the opinion of the Circuit Court of Appeals. Upon reading the appellate court's opinion, it is apparent

that the Circuit Court based its decision upon the controlling Oklahoma cases. The two cases cited by petitioner under this point (*Finley v. Finley*, 174 Okl. 457, 50 P. (2d) 643, and *McRoberts v. McRoberts*, 177 Okl. 156, 57 P. (2d) 1175) are not in point because in both cases alimony relief had been granted by the original trial court and the contracts therein were *intended* to be merged in the decree. If the trial court had granted the respondent in this case an award of alimony and thereafter she had attempted to recover against the petitioner in an action on the contract, the foregoing cases might be in point; but such is not the fact in this case.

Petitioner's argument that the mere refusal of the trial court to award respondent alimony without disapproving the contract resulted in the extinguishment of the contract between petitioner and respondent is not supported by the citation of any authorities from Oklahoma or elsewhere.

In the case of *Murphy v. McElroy*, 185 Okl. 288, 92 P. (2d) 369, it appears that while the divorce action was pending in the trial court, the parties entered into a settlement contract providing for the payment of certain installments by the husband to the wife. The divorce decree was entered in favor of the wife and no reference was made therein to the settlement or the payment of alimony. The husband defaulted after having made payments over a period of ten years. The Supreme Court of Oklahoma in that case which was instituted to recover under the contract, as is true here, stated with respect to whether or not the contract was extinguished by the divorce decree as follows:

"As we have already observed, the contract was not merged into a decree or extinguished by it but it stands as a valid and binding contract between the parties."

Likewise the Oklahoma Supreme Court in the case of *Elliott v. Dunham*, 130 P. (2d) 534, in considering the effect of a contract such as we have in this case said:

“Such agreements may be in the nature of stipulations entered into for the purpose of dispensing with proof, which are extinguished when the decree of divorce is rendered (*McRoberts v. McRoberts*, 177 Okl. 156, 57 P. (2d) 1175), or they may be of such nature that, where not incorporated in or superseded by the decree of divorce, their continued existence and binding effect is unimpaired thereby. (*King v. King*, 138 Okl. 40, 280 P. 271; *Murphy v. McElroy*, 185 Okl. 388, 92 P. (2d) 369; *Lazar v. Superior Court*, 16 Colo. (2d) 618, 107 P. (2d) 249; *Doig v. Palmer*, 97 Utah 150, 91 P. (2d) 442; 19 C. J. 250; 27 C. J. S. 1159; *Separation Agreements*, Lindey, p. 389.)

“The contract involved in the instant cases is clearly of the latter type. It contains no provision for its adoption by the trial court, or incorporation in the decree of divorce.”

The sole question for determination in the *Elliott* case was whether or not the settlement contract which was made between the husband and wife prior to the divorce decree was superseded or extinguished by the decree of divorce.

The question as to whether or not the contract in this case was or was not extinguished by the judgment rendered in the state court is essentially one involving the interpretation of the contract. As stated in *Elliott v. Dunham, supra*, “such agreements may be in the nature of stipulations entered into for the purpose of dispensing with proof which are extinguished when the decree of divorce is rendered * * * or they may be of such a nature that, where not incorporated in or superseded by the decree of divorce, their continued existence and binding effect is unimpaired thereby.”

The Circuit Court of Appeals with the complete record before it, reached the conclusion that the contract in this case was not impaired or superseded by the judgment in the state court for the reason that the manifest purpose of the contract disclosed that the parties *intended* that the contract was not to be so impaired or superseded. In this respect, the Circuit Court of Appeals stated:

“What then was the manifest purpose of the alleged contract? Did the parties intend that it should be submitted and approved by the divorce court, and as approved incorporated in and superseded by the divorce decree—obviously not.”

The construction of the contract in this connection was essentially a *factual* matter, involving the process of attempting to arrive at the *intention* of the parties. The rule announced in *Erie R. Co. v. Tompkins*, *supra*, does not require this court to inquire into the *factual* conclusions of the lower court but only to determine whether the *law* of the state has been applied to the factual considerations, so reached. This court will not review a question of fact on petition for *certiorari*. (*United States v. Johnson*, 268 U. S. 220, 69 L. ed. 923.)

The Circuit Court of Appeals in this case did apply the applicable law of the State of Oklahoma to the factual situation involved. This is evident from a reading of the opinion which cites and discusses controlling Oklahoma decisions in support of the opinion rendered. The opinion, therefore, is in complete accord with the controlling Oklahoma decisions as is required by the rule in *Erie R. Co. v. Tompkins*. As a matter of fact, upon reaching its conclusion as to the intention of the parties with respect to the effect and purpose of the contract, had the Circuit Court of Appeals reached any other conclusion, such adverse con-

clusion would have been in disregard of the Oklahoma controlling decisions and, therefore, would truly have been violative of the rule in *Erie R. Co. v. Tompkins*.

Petitioner's Point Four.

Petitioner states:

“Under controlling decisions of the Supreme Court of Oklahoma the present action is estopped or barred by the state court judgment in *Miller v. Miller*.”

In discussing this point, a brief history of this case may be in order.

When the action was originally instituted in the state court, the right of plaintiff to recover *ex contractu* was not clear, the decisions in *Murphy v. McElroy, supra*, and *Stark v. Stark*, 185 Okl. 348, 91 P. (2d) 1064, not having at that time been handed down. As hereinbefore pointed out, the trial judge of the state court treated the case as an action for alimony. After the trial of the case and on June 27, 1938, and July 11, 1939, respectively, the decisions in the *Stark* case and *Murphy* case were handed down, definitely holding that an action *ex contractu* can be maintained on such contracts as are involved in this case. It was therefore too late to present this theory in the trial court but as the Oklahoma Supreme Court stated in its opinion, the respondent did in her briefs “in effect invoke as applicable the doctrine of *Murphy v. McElroy*.” To this the petitioner objected in the Supreme Court on the ground that “plaintiff is attempting to change the theory of this lawsuit on appeal” as a result of which the state Supreme Court stated with respect to this particular matter that, “in so far as the theory presented by the plaintiff as outlined above (meaning the right to recover *ex contractu*) constitutes a departure from

the theory presented by her in the trial court, it will not be considered herein.”

As a result of the foregoing, the utmost that can be said is that the respondent failed in the original action for alimony for the reason that her proper remedy, an action *ex contractu*, was misconceived and she was compelled to pursue a mistaken remedy in an action for alimony. The Oklahoma Supreme Court has held in a number of decisions that the pursuance of a misconceived or fatuous remedy does not preclude a party from pursuing a remedy that actually exists and the doctrine of *res adjudicata* or election is not applicable in such cases to divest such person of a right actually vested in him by law or contract.

—*Bruner v. Bearden*, 80 Okl. 154, 195 Pac. 117;

Town of Cross v. DeRoberts, 51 Okl. 765, 155 Pac. 496;

Tulsa Rig Reel & Mfg. Co. v. Arnold, 94 Okl. 120, 221 Pac. 19;

Ahrens v. Commercial National Bank, 100 Okl. 250, 229 Pac. 237.

In *McIntosh, Administrator, v. Lynch, et al.*, 78 Okl. 85, 188 Pac. 1079, it was held as follows:

“The fatuous choice of a fancied remedy that never existed and the futile pursuit of it until the court adjudges that it never had existence, is no defense to an action to enforce a natural remedy inconsistent with that first invoked.”

To the same effect are:

Crane v. Owens, 180 Okl. 452, 69 P. (2d) 654;

Howard v. Brown, 172 Okl. 308, 44 P. (2d) 549;

Electrical Research Products v. Hanotis Bros., 170 Okl. 144, 39 P. (2d) 36;

Tulsa Rig Reel & Mfg. Co. v. Arnold, *supra*.

The above cases together with numerous others were considered by the Circuit Court of Appeals in the briefs presented to it. In as much as this case presents a typical situation where the respondent pursued a mistaken remedy in the state court, the above Oklahoma cases are controlling in permitting her to prosecute the real remedy available to her under the contract. Had this right been denied her, she would not only have been deprived of any sort of relief but she would have been deprived of an opportunity to obtain a full and complete adjudication of her rights under the contract, merely because her original action had been unfortunately misconceived; and because at the instance and objection of petitioner the Supreme Court of Oklahoma refused to pass upon the validity and enforceability of the contract. To have deprived her of such right would have been contrary to the above controlling Oklahoma decisions applicable in such cases.

Petitioner's Point Five.

Petitioner states:

“No Oklahoma Supreme Court decisions cited in the opinion of the Circuit Court of Appeals supports its decision, but so far as pertinent support our contentions.”

We see no reason to discuss this point as it is merely the negative statement of what has been stated affirmatively under Points Three and Four under each of which points we have cited controlling Oklahoma decisions supporting the opinion of the Circuit Court of Appeals.

Conclusion.

We, therefore, respectfully submit that the opinion of the Circuit Court of Appeals is based primarily upon a factual determination and is not in conflict with any controlling Oklahoma decisions but is in accordance therewith, and therefore, the petition for the writ of *certiorari* should be denied.

Respectfully submitted,

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